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CHILD WELL-BEING: A BENEFICIAL ADVOCACY FRAMEWORK FOR IMPROVING THE CHILD WELFARE SYSTEM?

Sarah H. Ramsey*

This Article explores the advantages and disadvantages of child well-being as a child welfare system advocacy framework. It examines the use of the concept of child well-being as a social indicator and the importance of poverty rates to the child welfare system. It also examines the use of child well-being as an outcome measure for the child welfare system, in particular in Child and Family Service Reviews ("CFSRs") and court evaluations. The possible impact of the child well-being concept is considered in the context of several programs, including income supports and problem-solving courts. The Article concludes that, overall, well-being provides a valuable framework for the future of child advocacy.

INTRODUCTION

What should happen when parents abuse or neglect their child? Should the child remain at home with oversight and services provided or be removed from the parents' care? If the child is removed, where should the child go? The child welfare system addresses these questions on a daily basis. The goals of the child welfare system have long been to provide safety and permanence for maltreated children. Increasingly, however, legislation and policy require that "child well-being" be an additional goal of the child welfare system.

"Well-being" suggests a composite measure that requires a broad examination of the child and the child's environment. This Article explores the implications and wisdom of having well-being as a goal for the child welfare system and for the courts that are part of that system.

Part I considers different uses of the child well-being concept to illustrate what the term means and its implications for the child

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welfare system. Part II turns to the question of what consequences might flow from the use of well-being as an advocacy framework for improving the child welfare system. Child well-being requires program coordination, which may produce substantial benefits for children if different agencies reduce conflicts among programs and enhance access to medical care, education, and other services. Courts should not, however, use child well-being to justify open-ended coercive intervention. Narrowly defined concerns related directly to children's safety or permanence should limit court authority. The Article concludes that using the concept of well-being has a number of benefits, provided that the system employs due process protections to avoid coercive over-intervention into families.

I. USES OF CHILD WELL-BEING

This Section explores two uses of the concept of child well-being. First, it considers the well-known use of well-being as a social indicator, paying particular attention to the importance of poverty measures for the child welfare system. Second, it examines a newer use of well-being as an outcome measure for the child welfare system.

A. *Child Well-Being as a Social Indicator*

1. Child Well-Being Constructs

Child well-being is often used to describe a composite of social indicators. For seventeen years, for example, the Annie E. Casey Foundation has provided benchmarks on children's well-being in its publication, *Kids Count*.¹ Ten indicators form the composite picture of well-being in the 2007 Kids Count Data Book: percent of low-birthweight babies; infant mortality rate; child death rate; teen death rate; teen birth rate; percent of teens who are high school dropouts; percent of teens not attending school and not working; percent of children living in families where no parent has full-time, year-round employment; percent of children in poverty; and percent of children in single-parent families.² The federal government

1. ANNIE E. CASEY FOUND., 2007 KIDS COUNT: DATA BOOK (2007), available at <http://www.aecf.org/MajorInitiatives/KIDSCOUNT/OnlineData.aspx> [hereinafter KIDS COUNT].

2. *Id.* at 29. The Casey Foundation provides state and national data and has a web-based data set that contains more extensive information on these indicators. *Id.*

also has used the child well-being concept as a structure for grouping social indicators. In 1997 the Federal Interagency Forum on Child and Family Statistics published the first *America's Children: Key National Indicators of Well-Being*, which provided national data on a series of measures.³ Currently, the indicators the Forum uses are grouped in the following areas: Population and Family Characteristics; Economic Security Indicators; Health Indicators; Behavior and Social Environment Indicators; and Education Indicators.⁴ Economic security indicators include child poverty and family income, secure parental employment, housing problems, food security and diet quality, and access to health care.⁵

Overall, these composite measures of child well-being help the child welfare system identify areas of risk for children over time. They do not, however, provide an explanation of why a risk has increased or decreased. In other words, they show effect, not cause. As one researcher explained, they are like the canary in the mine, warning of potential danger.⁶ It seems plausible, however, that because of the composition of the child welfare population, an increase in child poverty is likely to put even more pressure on the chronically under-funded and understaffed child welfare agencies.

2. Poverty as a Well-Being Indicator

Poverty and economic security are of particular importance to the child welfare system because low-income families comprise the majority of the child welfare service population and are likely to have multiple problems, including child maltreatment.⁷ Although child maltreatment occurs in all socioeconomic groups, the reported incidence is higher in low-income families, with neglect being the most common type of reported maltreatment.⁸ The correlation between poverty and child maltreatment is not surprising, given the devastating impact poverty can have on families and

3. FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, *AMERICA'S CHILDREN IN BRIEF: KEY NATIONAL INDICATORS OF WELL-BEING 2006* (2006), available at http://childstats.gov/pdf/ac2006/ac_06.pdf.

4. *Id.* at 2.

5. *Id.* at 15.

6. Kristin Anderson Moore et al., *The Uses (and Misuses) of Social Indicators: Implications for Public Policy*, 2003-01 CHILD TRENDS RES. BRIEF 2 (Feb. 2003), available at http://www.childtrends.org/Files//Child_Trends-2003_02_01_RB_UseAndMisuse.pdf.

7. See Kathy Barbell & Madelyn Freunklich, *Foster Care Today*, in *CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS* 504, 505-06 (Gerald P. Mallon & Peg McCartt Hess eds., 2005).

8. Diana J. English, *The Extent and Consequences of Child Maltreatment*, 8 *FUTURE OF CHILD.*, Spring 1998, at 39, 46-47.

children, negatively affecting parenting ability, access to necessities, and the child's environment.⁹ Poverty is associated with insufficient, unsafe housing and even homelessness, a lack of medical care, low quality daycare, substandard education, and violence.¹⁰ Children living in poverty are more likely to have poor health, developmental delays and learning disabilities, less education, more emotional and behavioral problems, and various other problems than non-poor children.¹¹

Unfortunately, nineteen percent (13.4 million) of American children lived in families with cash incomes below the federal poverty thresholds in 2005.¹² Eight percent of children lived in extreme poverty, which is defined by income less than one-half the federal poverty threshold.¹³ The federal poverty guidelines indicate, in dollars, that these families are trying to survive on \$17,170 or less for a family of three in 2007.¹⁴ A three-person family in extreme poverty would have less than \$8,585.¹⁵

The federal poverty measures have been substantially criticized on a number of bases. These include understating the level of poverty for some families by not counting, for example, work-related expenses, as well as overstating the level of poverty for some families by not counting, for example, in-kind support such as food stamps.¹⁶ Commentators have also raised other concerns, such as how to update the poverty thresholds over time and whether to use a relative, rather than an absolute, measure of poverty.¹⁷ Even when the poverty measures were first introduced, the developer of the poverty measures viewed them as a "measure of income inadequacy, not of income adequacy."¹⁸ In describing them, she wrote that "if it is not possible to state unequivocally 'how much is enough,' it should be possible to assert with confidence how much,

9. Other factors, such as underreporting of maltreatment in middle and upper-income households, may also play a role. See, e.g., Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 462 (1997).

10. E.g., *id.* at 461.

11. Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, 7 FUTURE OF CHILD., Summer-Autumn 1997, at 55, 58.

12. KIDS COUNT, *supra* note 1, at 52.

13. KIDS COUNT, *supra* note 1, at 58.

14. Annual Update of the HHS Poverty Guidelines, 72 Fed. Reg. 3147 (Dep't of Health & Human Servs. Jan. 24, 2007).

15. See *id.*

16. David M. Betson & Robert T. Michael, *Why so Many Children Are Poor*, 7 FUTURE OF CHILD., Summer-Autumn 1997, at 25, 33.

17. E.g., *id.* at 34.

18. Gordon M. Fisher, *The Development and History of the U.S. Poverty Thresholds—A Brief Overview*, NEWSL. OF THE GOV'T STAT. SEC. & THE SOC. STAT. SEC. OF THE AM. STAT. ASS'N, Winter 1997, at 6, 6–7, available at <http://aspe.hhs.gov/poverty/papers/hptgssiv.htm>.

on an average, is too little.”¹⁹ Other measures have been proposed,²⁰ but one fact remains constant—namely that the child poverty rate in the United States is inexcusably high. The United States’ response to child poverty lags substantially behind that of other industrialized nations.²¹

High poverty rates indicate what may be insurmountable problems for the child welfare system. The child welfare system, in isolation, is unlikely to be able to demonstrate a positive impact on the well-being of the majority of children in its care.

B. Well-Being as an Outcome Measure for the Child Welfare System

In addition to being used as a social indicator, child well-being has become a goal and an outcome measure within the child welfare system. Safety and permanence had long been goals of the child welfare system and were part of the Adoption Assistance and Child Welfare Act of 1980.²² The family preservation and family support provisions of the Omnibus Budget and Reconciliation Act introduced “well-being” into child welfare legislation in 1993.²³ When Congress passed the Adoption and Safe Families Act (“ASFA”) of 1997,²⁴ a major reform of the child welfare system, child well-being was one of its goals, along with safety and permanence.²⁵

ASFA also brought renewed attention to evaluation and assessment of compliance with ASFA mandates. Evaluation was considered a key component in improving the child welfare system.²⁶ Although ASFA includes child well-being as one of the primary goals of the

19. *Id.* (quoting Mollie Orshansky, *Counting the Poor: Another Look at the Poverty Profile*, 28 SOC. SECURITY BULL., Jan. 1965, at 3, 3).

20. Betson & Michael, *supra* note 16, at 32–33.

21. See, e.g., U.N. Children’s Fund [UNICEF], *The State of the World’s Children 2005*, at 28 fig.2.4 (2004); see also *Hearing on Economic Opportunity and Poverty in America Before the Subcomm. on Income Security and Family Support*, 110th Cong. 6 (2007) (statement of Gary Burtless, John C. and Nancy D. Whitehead Chair in Economics, The Brookings Institution) (noting that the United States has the highest child poverty rate of all rich nations), available at <http://www3.brookings.edu/views/testimony/burtless/20070213.pdf>.

22. FRED WULCZYN ET AL., *BEYOND COMMON SENSE: CHILD WELFARE, CHILD WELL-BEING, AND THE EVIDENCE FOR POLICY REFORM* 15 (2005).

23. *Id.*

24. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

25. WULCZYN ET AL., *supra* note 22, at 7.

26. See ADMIN. FOR CHILDREN, YOUTH & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., LOG NO. ACYF-CB-PI-98-02, PROGRAM INSTRUCTION (1998), available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/pi9802.htm.

child welfare system,²⁷ evaluation has focused more on safety and permanence than on child well-being.²⁸

One explanation for a lack of attention to child well-being is the difficulty in measuring it, reflected in the lack of consensus about well-being indicators for the child welfare population.²⁹ Evaluation requires a clear statement of goals, with measures designed to determine whether the goals are being met.³⁰ Children who are in the child welfare system, however, are likely to have multiple problems³¹ and the disproportionate representation of children of color adds a layer of complexity and potential for disagreement.³² Additionally, child welfare agencies and the courts may be reticent to employ child well-being measures to assess their own performance, because factors outside the agency and court control, such as school quality, influence well-being.³³

The challenges in using child well-being as an evaluation outcome are illustrated by two evaluation systems, the federal Child and Family Service Reviews ("CFSRs")³⁴ and the evaluation plans proposed by the American Bar Association Center on Children and the Law, the National Center for State Courts, and the National Council of Juvenile and Family Court Judges.³⁵

1. Evaluating the Child Welfare System: The Child and Family Service Reviews

The Social Security Amendments of 1994 authorized the Department of Health and Human Services to review whether state child welfare programs conform to federal requirements.³⁶ These reviews,

27. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.); 42 U.S.C. § 621 (4) (2000).

28. See, e.g., CTR. ON CHILDREN & THE LAW, AM. BAR ASS'N ET AL., *BUILDING A BETTER COURT: MEASURING AND IMPROVING COURT PERFORMANCE AND JUDICIAL WORKLOAD IN CHILD ABUSE AND NEGLECT CASES* 19 (2004) [hereinafter *BUILDING A BETTER COURT*].

29. *Id.*

30. See JOY A. FRECHTLING, *LOGIC MODELING METHODS IN PROGRAM EVALUATION* 16-17 (2007).

31. WULCZYN, *supra* note 22, at 147.

32. See, e.g., Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L. REV. 21, 39-48 (2005).

33. PEW COMM'N ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE* 30 (2004) [hereinafter *PEW REPORT*], available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

34. See generally 45 C.F.R. §§ 1355.31-37 (2007).

35. See generally *BUILDING A BETTER COURT*, *supra* note 28.

36. 45 C.F.R. §§ 1355.31-37 (2007).

however, had been criticized for being too narrow in focus.³⁷ In response, in 2001 the Administration for Children and Families implemented a new approach, the Child and Family Service Reviews ("CFSRs").³⁸ The CFSRs are used to determine whether states are meeting the goals of safety, permanency, and well-being for children receiving in-home services and in foster care, using systemic, family, and child outcome measures.³⁹

The initial CFSR process had three phases. In phase one, states conducted a self-assessment of their child welfare systems, including an analysis of defined categories of statewide data, and submitted a Statewide Assessment Report to the federal government.⁴⁰ Phase two was an onsite assessment of three sites in each state and the state child welfare agency, which the federal Department of Health and Human Services ("HHS") conducted.⁴¹ In this onsite assessment, HHS reviewed foster care and in-home service cases.⁴² In addition, the Department conducted interviews with children, parents, foster parents, adoptive parents, private service providers, and state agency caseworkers, supervisors, and administrators, as well as other state and local persons related to the child welfare system.⁴³ The Department then analyzed data from these first two phases to determine whether states were in compliance with the CFSR requirements.⁴⁴ All states failed to meet the federal performance standards, and hence all moved to phase three.⁴⁵ In phase three, states were required to submit a program improvement plan that indicated how the state would correct deficiencies.⁴⁶

The CFSR evaluation of children's safety, permanence, and well-being uses seven outcome measures, which incorporate twenty-three indicators.⁴⁷ The seven outcomes are:

37. U.S. GEN. ACCOUNTING OFFICE, CHILD AND FAMILY SERVICES REVIEWS: STATES AND HHS FACE CHALLENGES IN ASSESSING AND IMPROVING STATE PERFORMANCE 3 (2004) (statement and report of Cornelia M. Ashby before the Subcomm. on Human Resources, H.R. Comm. on Ways & Means).

38. *Id.*

39. 45 C.F.R. § 1355.34 (2007).

40. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., FEDERAL CHILD AND FAMILY SERVICES REVIEW GENERAL FINDINGS 1 (2004) [hereinafter CFSR REPORT], available at <http://www.acf.hhs.gov/programs/cb/cwmonitoring/results/genfindings04/intro.htm>.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 2.

45. PEW REPORT, *supra* note 33, at 29.

46. CFSR REPORT, *supra* note 40, at 1.

47. *Id.* at 2.

- Safety Outcome 1—Children are first and foremost protected from abuse and neglect;
- Safety Outcome 2—Children are safely maintained in their homes when possible;
- Permanency Outcome 1—Children have permanency and stability in their living situations;
- Permanency Outcome 2—The continuity of family relationships and connections is preserved;
- Well Being Outcome 1—Families have enhanced capacity to provide for children's needs;
- Well Being Outcome 2—Children receive services to meet their educational needs; and
- Well Being Outcome 3—Children receive services to meet their physical and mental health needs.⁴⁸

Common challenges states faced in meeting federal requirements for safety and permanence tended to be within the administrative authority of state child welfare administrations.⁴⁹ For safety, Outcome 1, for example, the CFSR assessment found that: “[r]eports that are not designated ‘high priority’ or ‘emergency’ are not being routinely investigated in accordance with established timeframes[;]”⁵⁰ and “[m]altreatment allegations on families with open child welfare cases are not being reported as new allegations and therefore there is no formal assessment of the validity of the allegation.”⁵¹

Not surprisingly, states also faced multiple challenges with well-being compliance, even though the well-being outcomes were related to processes rather than to actual measures of well-being.⁵² For education, physical health, and mental health, for example, the assessment was based on whether services were provided rather than an evaluation of how well the children were doing with regard to education and health.⁵³ As noted earlier, deciding on measures of well-being for this troubled and intermittent population is complex.⁵⁴

Even looking at service provision alone, the phase one assessment indicated that most states did not meet the federal

48. *Id.*

49. *See id.* at 8.

50. *Id.* tbl.I-3.

51. *Id.*

52. *See id.* at 10 tbl.I-5.

53. *See id.*

54. *See supra* text accompanying notes 30–33.

standards.⁵⁵ Common problems in meeting the needs for physical health, for example, were: “[t]he number of dentists/doctors in the State willing to accept Medicaid is not sufficient to meet the need[;]”⁵⁶ “[t]he agency is not consistent in providing children with preventive health and/or dental services[;]”⁵⁷ and “[t]he agency is not consistent in conducting adequate, timely health assessments.”⁵⁸ For mental health, common problems were: “[t]here is a lack of mental health services for children”⁵⁹ and “[t]he agency is not consistent in conducting mental health assessments.”⁶⁰ These findings illustrate the politically sensitive problem with child well-being noted earlier—the entities providing services related to well-being measures are not part of child welfare, which means that the child welfare agencies could be evaluated on measures outside their control.⁶¹

2. Building a Better Court

Because courts are an integral part of the child welfare system,⁶² the effort to improve performance through evaluation, evidenced in the CFSRs, includes court systems. *Building a Better Court*,⁶³ the result of a cooperative effort by the American Bar Association Center on Children and the Law, the National Center for State Courts, and the National Council of Juvenile and Family Court Judges, proposes a comprehensive evaluation plan for courts that handle abuse and neglect cases.⁶⁴ *Building a Better Court* includes an evaluation guide and a “toolkit” of evaluation instruments.⁶⁵ It notes that “many courts are not yet able to achieve excellence in handling child welfare cases. Excessive delays, rushed court hearings, lack of adequate or timely notice, brief or inaccurate judicial findings, and persistent lack of court and agency collaboration continue to be systemic problems.”⁶⁶

55. CFSR REPORT, *supra* note 40, at tbl.I-1.

56. *Id.* at 10 tbl.I-5.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *See supra* text accompanying note 33.

62. *See* Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L.Q. 147, 154 (1998).

63. BUILDING A BETTER COURT, *supra* note 28.

64. *See id.* BUILDING A BETTER COURT also was endorsed by the Pew Commission. PEW REPORT, *supra* note 33, at 59.

65. BUILDING A BETTER COURT, *supra* note 28, at 3.

66. *Id.* at 2.

The evaluation plans proposed were designed to complement the CFSRs and were considered key to improving the courts.⁶⁷

Building a Better Court lists court performance measures for five areas. The first four areas are safety, permanency, due process, and timeliness, and the fifth is child well-being.⁶⁸ For the first four performance areas, outcomes and measures are identified. For safety, for example, outcomes are:

- Children are, first and foremost, protected from abuse and neglect.
- No child should be subject to maltreatment while in placement.
- Children are safely maintained in their homes whenever possible and appropriate.⁶⁹

Measures for these safety outcomes are:

- Percentage of children who do NOT have a subsequent petition of maltreatment filed in court after the initial petition is filed.
- Percentage of children who are the subject of additional allegations of maltreatment within twelve months after the original petition was closed.⁷⁰

For the fifth performance area, child well-being, neither goals nor measures are provided.⁷¹ The authors' explanation for this omission is that:

[I]t is premature at this time to have courts adopt measures of well-being when consensus does not exist on measures for which courts have direct responsibility, such as safety of children, appropriate removal of children from their homes, successful achievement of permanency, and length of time in foster care.⁷²

In particular, measures of children's educational achievement and mental and physical health are omitted because:

- First, neither the federal government nor the social science research community have identified, or achieved consensus on, helpful statistical measures

67. *Id.* at iii, 4.

68. *Id.* at 14–20.

69. *Id.* at 15.

70. *Id.*

71. *See Id.* at 19.

72. *Id.*

that are specifically related to child welfare cases. By contrast, we were able to adapt measures of safety, permanency, and procedural fairness related to court performance in child welfare cases.

- Second, even if there were clear well-being measures, the judicial branch is not likely to have child well-being statistics readily available. Getting this information requires data exchanges with external entities, which will only become possible *after* the court has developed its own system to measure performance.
- Third, although courts influence children's educational attainment and health only indirectly, they clearly do impact children's safety and permanency.⁷³

Building a Better Court suggests that, in the future, when more progress has been made resolving these problems, courts should consider using child well-being as a performance measure in analyzing their own performance.⁷⁴

Both the CFSRs and *Building a Better Court* make valuable contributions to evaluation of the child welfare system, including the role of courts. But neither has successfully dealt with the evaluation of child-well being, which requires coordination among systems at multiple levels. The composite nature of well-being requires cooperation and communication among the many entities that work with children in the child welfare system.

II. IMPLICATIONS OF THE USE OF WELL-BEING

A major challenge in measuring impact on child well-being is the composite nature of the well-being concept. This challenge is also a strength—it encourages looking at children's needs across a spectrum of programs and striving for a coordinated approach focusing on children. This Section analyzes three types of service programs to explore the advantages and disadvantages of child well-being as a goal.

73. *Id.*

74. *Id.*

A. Program Coordination: Income Supports

As noted earlier, most families in the child welfare system are low income, and poverty correlates with negative child outcomes, including child maltreatment.⁷⁵ Income support programs, therefore, need to be an important part of a coordinated system directed at improving children's well-being. There are a number of government programs that provide in-kind assistance to families with children, such as the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"), a federal program that provides food and nutrition education for pregnant and postpartum women and young children,⁷⁶ and the State Children's Health Insurance Program ("SCHIP"), a cooperative federal-state program that provides health insurance for low-income families.⁷⁷

The primary cash assistance program is the Temporary Assistance to Needy Families ("TANF") program.⁷⁸ TANF replaced the prior cash program, Aid to Families with Dependent Children, when Congress adopted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.⁷⁹ Although TANF's "overarching purpose" was purportedly to improve the well-being of children,⁸⁰ the stringent work requirements, sanctions, and time-limited benefits have caused conflicts for parents who are also in the child welfare system.⁸¹ These conflicts need to be resolved because there is substantial overlap between the TANF and child welfare populations. One study, for example, found that over sixty percent of TANF recipients were involved with the child welfare

75. See *supra* Part I.A.2.

76. See Food & Nutrition Serv., U.S. Dep't of Agric., WIC's Mission, <http://www.fns.usda.gov/wic/aboutwic/mission.htm> (last visited Aug. 31, 2007). The WIC homepage offers links to information about WIC. Food & Nutrition Serv., U.S. Dep't of Agric., About WIC, <http://www.fns.usda.gov/wic/aboutwic/default.htm> (last visited Aug. 31, 2007).

77. See U.S. Dep't of Health & Human Servs., State Children's Health Insurance Program—Overview, <http://www.cms.hhs.gov/LowCostHealthInsFamChild/> (last visited Aug. 31, 2007).

78. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

79. See *id.*

80. *Welfare Reform and Childcare: Hearing Before the H. Comm. on Education and the Workforce*, 107th Cong. (2002) (statement of Tommy G. Thompson, Secretary, Department of Health and Human Services), available at <http://www.hhs.gov/asl/testify/t20020409.html>. For reviews of TANF's negative effects on children see, for example, Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386 (2002).

81. See, e.g., Ward Doran & Roberts, *supra* note 80, at 386–90; Sarah H. Ramsey, *Children in Poverty: Reconciling Children's Interests with Child Protection and Welfare Policies*, 61 MD. L. REV. 437, 440–43, 450–52 (2002).

system at some point, and twenty-six percent had had a child placed.⁸²

Child welfare system workers have seen conflicts between the two systems, including work requirements disrupting schedules for court hearings and parenting programs, and families overwhelmed with the stress of trying to comply with both systems.⁸³ Workers also have seen changes in the types of cases reported. One study, for example, found that more families had been reported for inadequate supervision, which workers believed “was the direct result of welfare parents working and not being able to secure appropriate child care.”⁸⁴ Workers have also identified a new problem, namely expectations that somewhat older children, such as ten-year-olds, care for younger siblings even though they are too young to do so.⁸⁵

State-specific studies have found connections between families who have been sanctioned and abuse and neglect reports;⁸⁶ one study found that one out of six reports involved sanctioned families.⁸⁷ Another study found that “sanctioned families were 50 percent more likely to have had some contact with the child welfare system than nonsanctioned families.”⁸⁸ Correlation between sanctions and child protective involvement, however, does not necessarily mean that the sanction caused the contact with child welfare; instead, both the child protective services referral and the sanction may have been due to other causes.⁸⁹

A recent study found a correlation between an increase in foster care use and a decrease in public assistance.⁹⁰ The authors suggest

82. Mark E. Courtney & Amy Dworsky, *Those Left Behind: Enduring Challenges Facing Welfare Applicants*, ISSUE BRIEF NO. 107 (Chapin Hall Center for Children, Chicago, Ill.), May 2006, at 7–8.

83. ROB GEEN ET AL., URBAN INST., WELFARE REFORM’S EFFECT ON CHILD WELFARE CASELOADS 20, 35 (2001), available at http://www.urban.org/UploadedPDF/310095_discussion01-04.pdf.

84. *Id.* at 23 (reporting on multistate caseworker reports, but noting that caseload data documented this effect in Michigan only).

85. *Id.*

86. *Id.* at 25.

87. *Id.* (reporting on an informal study in Alameda County California where about 100 of 600 abuse reports came from households that had also be sanctioned by TANF).

88. *Id.* These numbers were cited from a 1996 study in Michigan. LAURA COLVILLE ET AL., MICH. FAMILY INDEPENDENCE AGENCY, A STUDY OF AFDC CASE CLOSURES DUE TO JOBS SANCTIONS: APRIL 1996 AFDC CASE CLOSURES (1997), available at http://www.michigan.gov/documents/FIA-SanctionStudy_15504_7.pdf.

89. See GEEN ET AL., *supra* note 83, at 20–21 (discussing other factors that may have affected child welfare caseloads).

90. Christopher A. Swann & Michelle Sheran Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow?*, 43 DEMOGRAPHY 309, 329 (2006) (finding, in a national study of state-level foster care caseloads and state-specific factors, that female incarceration was also correlated with increased use of foster care).

three reasons that may account for this increase: first, the decrease in family income due to benefit reduction may increase the number of maltreated children; second, relatives who were caring for a welfare-eligible child may need to be formally approved as foster parents to receive foster parent subsidies because they can no longer afford to provide care by relying on welfare; and third, foster care may be a substitute for public assistance, because federal funding systems give state officials an incentive to switch children from TANF, which has limited block-grant funding, to the more open-ended funding of foster care.⁹¹

Increased use of foster care, however, runs counter to the goals of the child welfare system. Indeed, to decrease the use of long-term foster care, ASFA requires a permanency hearing within twelve months and imposes stringent time requirements for filing termination of parental rights petitions.⁹² TANF sanctions or ineligibility could potentially set off a series of events that would have a negative impact on the child: a parent loses TANF support; the child is maltreated and moves to a relative's home for safety; a lack of financial support results in the child moving to non-relative foster care; and within a year a termination of parental rights petition is filed.

If TANF and the child welfare system were part of an integrated effort to improve children's well-being, these conflicts and the harm that they cause might be reduced. Families would have an easier time navigating both systems and would have more assistance in dealing with their child welfare and employment problems.

B. Program Coordination: Access to Legal Assistance

An expansive concept of child well-being resulted in an innovative service model—a medical-legal partnership. Dr. Barry Zuckerman, a pediatrician, developed the idea of medical-legal partnerships after over twenty years of service to low income families.⁹³ He had “cared for thousands of poor children and had grown tired of watching kids made sick by living in poverty.”⁹⁴

91. See *id.* at 329–30.

92. 42 U.S.C. § 675(5)(C), (E) (2000).

93. See Medical Legal Partnership for Children, Boston Medical Center, *Our Mission & History*, <http://www.mlpforchildren.org/OurMissionHistory.aspx> (last visited Sept. 1, 2007).

94. *Id.*

His patients suffered from malnutrition, homelessness, and exposure to violence, and Dr. Zuckerman realized that a lawyer—who can ensure lawful access to food stamps, fight illegal evictions, and protect families from abuse—could do more than a pediatrician to improve child health.⁹⁵

Lawyers who are part of a treatment team can assist patients and their families directly, and also indirectly, by educating doctors about legal issues.⁹⁶ Examples of situations where lawyers have been important include enforcing a housing code to make a landlord get rid of mold in the home of a child asthma patient and helping a mother access rental assistance and other benefits when she lost her job due to multiple absences spent caring for her child, who had sickle cell anemia.⁹⁷

Risk factors for child maltreatment are present in many areas where legal remedies may exist, but are difficult for low-income parents to access. Risk factors include, for example, lack of health insurance, lack of adequate child care, poor schools, homelessness, exposure to racism or discrimination, and exposure to environmental toxins.⁹⁸ The law provides a means to address many of these problems, but gaining access to legal resources is very difficult.⁹⁹ Legal service providers are typically overloaded with cases and are limited as to the type of cases they can take.¹⁰⁰ For example, parents of a child with limited mobility may be able to get legal and financial assistance to provide her with a wheelchair ramp, but not assistance in getting a zoning variance to permit the ramp. Some courts, such as family courts, try to help litigants who do not have legal representation, but understanding legal processes and options is very difficult, even with standardized forms and other aids.¹⁰¹ A

95. *Id.*

96. See Barry Zuckerman et al., *Why Pediatricians Need Lawyers to Keep Children Healthy*, 114 PEDIATRICS 224 (2004) (explaining the role of lawyers in children's health care).

97. *Id.* at 224, 226.

98. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., RISK AND PROTECTIVE FACTORS FOR CHILD ABUSE AND NEGLECT 3–4 (2004), available at <http://www.childwelfare.gov/preventing/pdfs/riskprotectivefactors.pdf> (excerpted from DAVID THOMAS ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., EMERGING PRACTICES IN THE PREVENTION OF CHILD ABUSE AND NEGLECT (2003), available at <http://www.childwelfare.gov/preventing/programs/whatworks/report/report.pdf>).

99. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2005), available at <http://www.lsc.gov/JusticeGap.pdf>.

100. See David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1131–32 (2007).

101. See, e.g., Deborah L. Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013 (2004); Gary Blasi, *How Much Access? How Much Justice?* 73 FORDHAM L. REV. 865 (2004).

grandmother with de facto custody of a grandchild, for example, may need legal advice in deciding whether she should apply for custody, guardianship, or foster parent status in order to gain the ability to consent to medical care and meet the child's other needs. A non-citizen mother who is a domestic violence victim may be afraid to complain, because she believes she will be deported if she does not stay with her citizen husband.

These medical-legal partnerships offer a positive example of a benefit that can flow to children from a broad examination of children's well-being. Adding lawyers to the pediatric treatment team puts child advocates in an important position to further children's interests.

C. Program Coordination: Problem-Solving Courts

Problem-solving courts represent a different service coordination model, one where a goal of child well-being raises some concerns. After the passage of the Adoption Assistance and Child Welfare Act of 1980, courts have had a major role in the child welfare system and are responsible for oversight, including maintaining a schedule of hearings directed toward minimizing a child's time in foster care.¹⁰² With problem-solving courts, the role of the court as service-coordinator and provider becomes even more evident.

Problem-solving courts are based in therapeutic jurisprudence, which examines the impact of law as a social intervention that can have therapeutic or "antitherapeutic" consequences.¹⁰³ A unified family court, for example, would often operate on a one-judge, one-family model, meaning that the same judge would handle all cases related to a particular family.¹⁰⁴ The same judge therefore might preside at the adjudication and disposition of child abuse and neglect, child support, and divorce cases involving the same family and may hear related criminal cases as well.¹⁰⁵ The one-judge, one-family model expects the judge to consider the family as a social system, where the actions of one family member or the order of a judge affecting one family member affect the family as a

102. See Hardin, *supra* note 62, at 152–53.

103. See Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 645, 646 (David B. Wexler & Bruce J. Winick eds., 1996).

104. Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L.Q. 31, 32–33 (1998) (quoting Paul A. Williams, *A Unified Family Court for Missouri*, 63 UMKC L. REV. 383, 384 (1995)).

105. Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L.Q. 333, 344–45 (2003).

whole.¹⁰⁶ The judge's goal goes beyond effective management.¹⁰⁷ The goal is "to make the emotional life of families and children better."¹⁰⁸ Under this approach:

[t]he legal label attached to the case is less important to the delivery of therapeutic justice than the ability of the court to make appropriate orders to address the underlying dynamics causing the family to come to the court's attention in the first place.¹⁰⁹

Specialized problem-solving courts—such as drug-treatment courts, community courts, domestic violence courts, and unified family courts—tend to downplay the role of the court as decision-maker and enforcer and instead emphasize a service function, team decision-making, and a focus on ultimate outcomes benefiting the litigants and community.¹¹⁰ Judges in problem-solving courts are expected to eschew the traditional judicial role of a "restrained and disinterested umpire[]" and instead be actively involved in identifying and permanently resolving the problems that caused court involvement.¹¹¹

Critics of problem-solving courts identify a number of due process concerns. These include the blending of criminal and civil proceedings, the potential for judicial bias, and the need for litigants to waive due process rights as a condition for admission to these courts and their services.¹¹² An additional concern is whether problem-solving courts closely examine the underlying basis for asserting their own jurisdiction.¹¹³

In a child protective proceeding, for example, the court first should consider whether the parents have in fact abused or neglected their child under the law, which would give the state a compelling interest in asserting jurisdiction over the family.¹¹⁴ Second, the court should examine whether the intervention proposed

106. *Id.* at 339–40.

107. *Id.* at 339.

108. *Id.*

109. *Id.* at 340.

110. See Donald J. Farole, Jr. et al., *Applying the Problem-Solving Model Outside of Problem-Solving Courts*, 89 JUDICATURE 40, 40–41 (2005).

111. Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 96, 98–99 (2006).

112. See, e.g., Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 438–40, 443–44 (2002).

113. See Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 342.

114. See, e.g., *In re Juvenile Appeal* (83-CD), 455 A.2d 1313, 1318–20 (Conn. 1983).

by the state is the least intrusive possible, with due regard for the fundamental right of parents to rear their children.¹¹⁵ This examination should include a finding on whether the state has met statutory mandates for keeping families together, such as the requirement that a state make "reasonable efforts . . . prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home. . . ."¹¹⁶ These issues are narrower questions of law and are more appropriate for the court than a broad-based inquiry into a child's well-being.

The role of attorneys in problem-solving courts also raises due process concerns if attorneys for parents and children will be part of a team that addresses overall needs, rather than the narrower issues of minimal care and the least intrusive intervention. Attorneys for children may be expected to advocate for extensive intervention related to the child's well-being, rather than focus more narrowly on the child's wishes.¹¹⁷ Parents' counsel may be pressured to consider the children's long-term well-being, rather than whether the parents can provide a minimally adequate level of care.¹¹⁸ Even attorneys for defendants accused of crimes, such as drug use, may be expected to participate in a non-adversarial, team approach.¹¹⁹

As these examples show, the use of child well-being as an outcome measure related to the child welfare system has pluses and minuses. Better coordination between TANF and the child welfare system might enable multi-problem, low-income parents to navigate both systems more successfully. The overlap between TANF and child welfare system populations indicates the need for intensive, comprehensive assistance for these families, not competing demands. The medical-legal partnership presents a different aspect

115. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

116. 42 U.S.C. § 671(a)(15)(B) (2000).

117. The legal community has long engaged in substantial debate about the proper role of attorneys for children in abuse and neglect cases. For a discussion of the issues, see Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240 (2006), and other articles in the *Special Issue on Legal Representation of Children*, 6 NEV. L.J. 571-1424 (2006). See also Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287 (1983).

118. See, e.g., Janet Weinstein, *Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. Miami L. Rev. 79, 141-42 (1997) (exploring the role of counsel related to conflicts between a best interests goal and the adversary system).

119. See, e.g., Timothy Casey, *When Good Intentions Are not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1482-83 (2004); Judy H. Kluger, et al., *The Impact of Problem Solving on the Lawyer's Role and Ethics*, 29 FORDHAM URB. L.J. 1892, 1921 (2002).

of service coordination, viewing access to legal services as a key component in children's physical and mental well-being.

Problem-solving courts provide another example of service coordination, but one that is problematic because of the courts' coercive authority.¹²⁰ The services that parents may access are under the auspices of the court, which has the authority to remove children, keep them in foster care, and even terminate parents' rights.¹²¹ An expansive goal like well-being might inappropriately encourage courts to intervene and stay involved with a family even when the state no longer has a compelling interest.

CONCLUSION

Using child well-being as an advocacy framework for improving the child welfare system has substantial potential benefits. First, the general acceptance of child well-being as a social indicator benefits the child welfare system, because the composite concept of well-being bolsters an argument for broader social supports for families. Without broader social supports that reduce child poverty, the child welfare system will continue to struggle against obstacles that have consistently overwhelmed agencies and the families they serve.

Second, using child well-being as an outcome goal has advantages as well, because doing so supports a service-coordination model. Better coordination among systems and subordination of systems to a child well-being goal should help reduce conflicts among programs, including, for example, conflicts between TANF and child welfare.

Third, a child well-being framework supports innovative uses of lawyers and courts. Lawyers, for example, may participate in programs such as medical-legal partnerships that seek to improve children's health. Courts may become problem-solving courts that coordinate services for multi-problem families while incorporating necessary due process protections. Overall, child well-being provides a valuable framework for the future of child advocacy.

120. An additional problem is the need for evaluation of problem-solving courts, but this important topic lies beyond the scope of this Article.

121. *Santosky v. Kramer*, 455 U.S. 745, 780-81 (1982).

